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International Covenant on Civil and Political Rights

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Human Rights Committee

Communication No. 1839/2008

Views adopted by the Committee at its 109th session (14 October–1 November 2013)

Submitted by:	Aleksandr Komarovsky (not represented by counsel)
Alleged victim:	The author
State party:	Belarus
Date of communication:	7 August 2008 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 10 December 2008 (not issued in document form)
Date of adoption of Views:	25 October 2013
Subject matter:	Freedom of expression; peaceful assembly
Procedural issues:	Exhaustion of domestic remedies; level of substantiation of claims
Substantive issues:	Impermissible restrictions to freedoms of expression and peaceful assembly
Articles of the Covenant:	19 (para. 2) and 21
Articles of the Optional Protocol:	2 and 5 (para. 2 (b))

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Annex

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (109th session)

concerning

Communication No. 1839/2008*

Submitted by:	Aleksandr Komarovsky (not represented by counsel)
Alleged victim:	The author
State party:	Belarus
Date of communication:	7 August 2008 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 October 2013,

Having concluded its consideration of communication No. 1839/2008, submitted to the Human Rights Committee by Aleksandr Komarovsky under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author is Aleksandr Komarovsky, a Belarusian national born in 1942. He claims to be a victim of violations by Belarus of his rights under articles 19 (para. 2) and 21 of the International Covenant on Civil and Political Rights.[1] The author is not represented by counsel.

The facts as submitted by the author

2.1 On 8 February 2008, the author, together with three other individuals, requested permission from the Executive Committee of Zhodino City to hold a meeting, to be followed by a street procession and a concert, on 23 March 2008 near the entrance to

* The following Committee members participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Kheshoe Parsad Matadeen, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Víctor Manuel Rodríguez Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili, and Ms. Margo Waterval.

[1] The Optional Protocol entered into force for the State party on 30 December 1992.

Zhodino Park of Culture, on the ninetieth anniversary of the establishment of the People's Republic of Belarus. The meeting and activities were to take place from 3 p.m. to 6 p.m.

2.2 On 21 February 2008, the Executive Committee of Zhodino City informed the applicants, including the author, that on 22 and 23 March 2008 the twenty-fifth republic-wide marathon would be taking place in Zhodino, on its central streets. As no other explanations were provided, the author continued with preparations for a peaceful meeting. On 17 March 2008, the Executive Committee issued an order denying permission to hold the meeting, and thereafter a street procession and a concert, on 23 March 2008, due to the holding of the twenty-fifth national marathon.

2.3 On 19 March 2008, the author and the three other organizers informed the Executive Committee of Zhodino City of their decision to cancel the planned events. They also advised that they were discussing the possibility of holding a peaceful event on the site in front of the SITI shopping centre, the site in the grounds of the GRES shop, the site in front of the Patriot Mother-Kupriyanova sculpture, or in any other location that would not interfere with the marathon.

2.4 On 20 March 2008, the Executive Committee of Zhodino City informed the organizers that it could not examine their request of 19 March 2008, as it did not satisfy the requirements set out in the Law on Mass Events. The author and the other organizers were informed that if they held the meeting on 23 March 2008, it would be considered as an unauthorized mass event.

2.5 The author and the other organizers decided not to hold the event on 23 March 2008. However, in order to inform the persons who were aware of the venue for the 23 March 2008 event that the event had been cancelled, on 23 March at 3 p.m., the author and the other organizers arrived at Zhodino Park of Culture and met some 10 to 15 persons there. More people arrived shortly thereafter. The author and the persons gathered decided to commemorate the heroes who had died during battles fighting for the country and to place flowers at the foot of the Heroes Live Forever obelisk. According to the author, the commemoration and placing of flowers was not a mass event of a political, social or economic nature and it was not necessary to obtain permission in order to conduct such activities.

2.6 A group of around 20 persons walked slowly to the obelisk; some of the younger ones were carrying the historical national flag of Belarus and the flag of the European Union. When some police officers who were standing nearby noticed the flags, they immediately ordered them to be put away. The police officers did not give any orders to the author, and he and the rest of the group reached the obelisk, placed flowers and released red and white balloons. The actions mentioned lasted for approximately five minutes.

2.7 When people started to leave, the author was approached by police officers and was taken to a police station. He was questioned about the meeting and was held at the police station until the morning of the next day. On 24 March 2008, Zhodino City Court of the Region of Minsk concluded that the author had held an unauthorized mass event and ordered him to be held in administrative arrest for a period of seven days. On 25 March 2008, the author appealed the City Court's judgement, at Minsk Regional Court, however on 8 April 2008 the Regional Court upheld the lower court's decision. On 16 May 2008, the author appealed the Regional Court's decision to the Supreme Court, but his appeal was rejected as unfounded on 28 June 2008.

The complaint

3. The author claims violations by the State party of his rights under articles 19 (para. 2) and 21 of the Covenant, as he was detained and punished for participating in a gathering and expressing his opinions on 23 March 2008.

State party's observations on admissibility

4.1 On 19 February 2009, the State party challenged the admissibility of the communication, arguing that the author had failed to exhaust domestic remedies. It recalled that, on 24 March 2008, Zhodino City Court had concluded that the author had committed an administrative offence under article 23.34, paragraph 2, of the Procedural-Executive Code of Administrative Offences, and had imposed on him a penalty of seven days of administrative arrest as he had disregarded the prescribed procedure for organizing and holding a meeting and a street procession. On appeal, on 8 April 2008, Minsk Regional Court had confirmed that decision. On 28 June 2008, the Deputy Chairperson of the Supreme Court had dismissed the author's further appeal.

4.2 The State party notes that the author's appeal to the Supreme Court has never been examined by the Chairperson of the Supreme Court. It explains that, in accordance with the provisions of the administrative law, the author could have appealed the decision of Zhodino City Court to the Chairperson of the Supreme Court, and he could have requested the Prosecutor General to lodge a protest with the Supreme Court in regard to the lower court's decision. Under article 12.11, paragraphs 3 and 4, of the Procedural-Executive Code of Administrative Offences, a complaint (protest) concerning a decision that has been made within the ambit of administrative proceedings and that has entered into force can be reviewed within a period of six months, and a complaint submitted after that deadline has passed cannot be reviewed. The author complained to the Prosecutor's Office about the national courts' decisions, however those decisions were not examined due to the author's failure to pay the required fee. Given that the above-mentioned six-month deadline has passed, the author's complaints challenging the national court's decision to hold him liable for having committed an administrative offence cannot be reviewed. The State party submits that the author did not exhaust all available domestic remedies, and maintains that those remedies would have been accessible and effective.

4.3 The State party further notes that the appeals procedure that exists within the supervisory review proceedings, as provided for in the Procedural-Executive Code of Administrative Offences, is an effective remedy. Under article 12.1 of the Code, a ruling on an administrative offence can be appealed, inter alia, by the individual against whom the administrative case is opened, an injured party, or their representatives or lawyers, whereas the prosecutors can introduce protest motions against such rulings. Article 12.4 of the Code provides, inter alia, that a complaint concerning a ruling on an administrative offence may be lodged within 10 days of the day on which the individual against whom the administrative case has been initiated is notified of it, and within 5 days if the administrative case concerns the imposition of administrative arrest or of deportation. Furthermore, in line with articles 12.5 and 12.6 of the Code, if the persons subject to article 12.1 of the Code were, for justified reasons, unable to meet the aforementioned deadline, they may request the court to determine a new deadline. When a court approves such a request, the execution of the rulings is stayed.

4.4 The State party points out that 2,739 complaints were submitted by individuals to the Prosecutor's Office in 2008 challenging decisions under which they had been held liable for having committed an administrative offence; of these, 422 were upheld. During the same year, some 105 protests were lodged by the Prosecutor's Office to the Supreme Court in regard to administrative cases; the Supreme Court upheld 101 of them.

Author's comments on the State party's observations

5. On 6 May 2009, the author submitted that the remedies mentioned by the State party were not effective and, thus, he did not have to exhaust them. He also notes that he did submit a complaint to the Supreme Court within supervisory proceedings, but that it had been dismissed. He further notes that examination of a case under supervisory review

proceedings is dependent on the discretion of the Chairperson of the Supreme Court, as he or she decides whether to initiate such proceedings. It is clear that the examining of a complaint under supervisory review proceedings is not guaranteed by law; it is not obligatory and requires financial means and, thus, cannot be considered as a precondition to submitting a complaint to an international complaints procedure. In addition, a person who submits a complaint under supervisory review proceedings is not ensured full participation within such proceedings, which is contrary to the principles of openness, equality of arms and publicity. With regard to the statistical data provided by the State party, the author points out that it is not clear how many administrative cases concerning violations of rights guaranteed under the Covenant have been challenged or reviewed under supervisory review proceedings. The author also points out that the State party disregards the Views of the Committee where these are adopted in cases against the State party.

State party's observations on the merits

6.1 On 26 May 2009, the State party submitted its observations on the merits. It notes that article 35 of the Constitution guarantees the freedom to hold assemblies, gatherings, street processions, demonstrations and pickets that do not disrupt public order and do not violate the rights of other citizens. The procedure for holding such events is provided by law. The provisions of the Law on Mass Events are aimed at creating conditions for the realization of citizens' constitutional rights and freedoms and the protection of public safety and public order during the holding of such events on streets and squares and in other public locations. The State party recalls that the author was lawfully found guilty of having committed an administrative offence under article 23.34, paragraph 2, of the Procedural-Executive Code of Administrative Offences (breaching the procedure for organizing and holding a mass event, street procession) and a penalty was imposed on him of seven days' administrative arrest by Zhodino City Court on 24 March 2008. This decision was later upheld by Minsk Regional Court, and the author's appeal to the Supreme Court was dismissed on 28 June 2008. The author did not have authorization to organize such a mass event on 23 March 2008 and he was aware of the prohibition on holding it.

6.2 The State party adds that according to article 19, paragraph 2, of the Covenant, every individual has the right to freedom of expression; this right includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. However, article 19, paragraph 3, of the Covenant imposes special duties and responsibilities on the rights holder and thus the right to freedom of expression may be subject to certain restrictions that shall be provided by law and are necessary: (a) for respect of the rights or reputations of others; and (b) for the protection of national security or of public order, or of public health or morals. Article 21 of the Covenant recognizes the right to peaceful assembly. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.

6.3 The State party explains that, as a party to the Covenant, it has incorporated the provisions of articles 19 and 21 into its domestic legal system. In conformity with article 23 of the Constitution, restrictions upon the rights and freedoms of individuals are only permitted in instances specified by the law, in the interest of national security, public order, or the protection of public health or morals, or of the rights and freedoms of other persons. Analysis of article 35 of the Constitution, which guarantees the freedom to hold public events, clearly demonstrates that the Constitution establishes the legal framework for holding such events. The organization and holding of assemblies, gatherings, street processions, demonstrations and pickets is regulated by the Law on Mass Events of 7 August 2003, which requires that prior authorization be obtained to hold such events.

Freedom of expression, as guaranteed under the Constitution, may be subject to restrictions only in instances provided by law, in the interest of national security, public order, or the protection of public health or morals, or of the rights and freedoms of other persons. Therefore, the restrictions provided for under Belarusian law are in conformity with the State party's international obligations, and are aimed at protecting national security and public order: in particular, this concerns the provisions of article 23.34 of the Procedural-Executive Code of Administrative Offences and article 8 of the Law on Mass Events.

Author's comments on the State party's observations

7.1 The author provided his comments on the State party's observations on 21 March 2010. He submits that in light of article 35 of the Constitution of the Republic of Belarus, as well as its obligations under, inter alia, the Covenant, the State party may not interfere arbitrarily with the right of peaceful assembly.

7.2 The author notes that instead of being ensured the rights that are guaranteed under the Covenant, he and the other organizers received punishment by the State party in the form of a seven-day administrative arrest. In this connection, he points out that the national authorities had failed to provide any justification when rejecting their application. In addition, the author notes that in light of the refusal to grant permission to hold the events on 23 March 2008, he, together with the other organizers, decided not to hold them, and they did not hold them.

7.3 As regards the peaceful meeting that took place on 23 March 2008 near the Park of Culture, the author notes that this was merely a meeting of a group of like-minded persons who wished to commemorate the heroes who had fought for the country and to place flowers at the foot of a monument. Such activities, namely to meet with like-minded persons and to place flowers, did not require the obtaining of permission from the authorities.

7.4 The author further notes that the State authorities should apply the Law on Mass Events in such a manner as to facilitate the enjoyment of the rights of freedom of expression and of peaceful assembly. The authorities should not complicate the procedures for enjoyment of the respective rights, but rather simplify them in order to ensure that the rights can be enjoyed in practice. In this regard, the author points out that a system whereby permission must be obtained for organizing and holding mass events in fact disallows the holding of such events, and facilitates broad interpretations by the State authorities of criteria that allow permission to assemble peacefully to be denied. He also points out that in the State party, and in Zhodino in particular, activities organized by civil society and the opposition are constantly prohibited, unlawfully. The State authorities usually do not provide any justification for refusing to allow such activities to be held, or else the refusal is justified on formal shortcomings. The author considers that, in essence, the existing system for obtaining permission to hold a mass event is controlled centrally and is based on ideological considerations.

7.5 The author notes that his punishment in the form of a seven-day administrative arrest constitutes degrading, repressive and discriminatory treatment, and was not necessary for purposes of restrictions permitting interference with the rights of peaceful assembly and of freedom of expression. According to him, none of the individuals who carried balloons and placed flowers at the foot of obelisk on 23 March 2008, a date of national pride and the establishment of the People's Republic of Belarus, and who were later found guilty of committing an administrative offence, endangered national security, public order, the rights and freedoms of others or public health or morals. The author further notes that the State party, in its observations regarding admissibility, arbitrary interprets the provisions of the Covenant and the Optional Protocol thereto, disregarding general comment No. 33 of the Human Rights Committee.

7.6 The author emphasizes that in a democratic country, the right to hold a peaceful mass event may not be restricted arbitrarily, but only on exact and clear grounds, when there are serious reasons for such restrictions. When a country becomes a party to the Covenant and its Optional Protocol, it should respect its obligations thereunder not only in theory, but also in practice. Therefore, rights under the Covenant may not be restricted merely on formalistic grounds. They may be limited only when the restriction is provided by law, it is necessary in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others, and it is necessary in a democratic society. In this regard, the author notes that the State authorities failed to examine the merits of applications from representatives of civil society, instead dismissing them on formalistic grounds. He also notes that in light of the absence in the national laws of a restriction that specifies "which is necessary in a democratic society", any future picket, or decision to commemorate the heroes who fought for the country and died in battle, and to place flowers at the foot of a monument, may be restricted arbitrary in the State party in the interests of "national security and public order".

7.7 Finally, the author points out that the interpretation by the State party of its obligations under the Covenant and its Optional Protocol, as mentioned in its observations on the admissibility of the present communication, in essence results in the violation of the rights mentioned therein.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

8.2 As required under article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

8.3 The Committee takes note of the State party's argument that the author failed to exhaust domestic remedies, as he did not apply for supervisory review proceedings to the Chairperson of the Supreme Court of Belarus and to the Prosecutor's Office. The Committee notes that, according to the materials available on file, it appears that the author made a complaint to the Supreme Court under the supervisory review proceedings, however on 28 June 2008 his appeal was dismissed as unfounded. The Committee further notes that the State party has not indicated whether the procedure before the Prosecutor's Office under the supervisory review proceedings has been successfully applied in cases concerning freedom of expression and the right to peaceful assembly, and has not specified the number of such cases. The Committee recalls its jurisprudence, according to which the State party's supervisory review proceedings, allowing the review of court decisions that have taken effect, does not constitute a remedy that has to be exhausted for the purposes of article 5, paragraph 2 (b), of the Optional Protocol.[2] In the circumstances, the Committee considers that it is not precluded by article 5, paragraph 2 (b), of the Optional Protocol, from examining the present communication.

[2] See, for example, communication No. 1785/2008, *Olechkevitch* v. *Belarus*, Views adopted on 18 March 2013, para 7.3; communication No. 1784/2008, *Schumilin* v. *Belarus*, Views adopted on 23 July 2012, para. 8.3; communication No. 1814/2008, *P.L.* v. *Belarus*, Decision of inadmissibility, adopted on 26 July 2011, para. 6.2.

8.4 The Committee considers, therefore, that the author has sufficiently substantiated his claims under article 19 (para. 2) and article 21, of the Covenant, for purposes of admissibility. Accordingly, it declares the communication admissible and proceeds to its examination on the merits.

Consideration of the merits

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

9.2 The Committee notes the author's claim that he was detained when merely participating in a small gathering on 23 March 2008 at Zhodino Park of Culture in commemoration of national heroes, and that a penalty was subsequently imposed on him of seven days' administrative arrest for an alleged breach of the Law on Mass Events, in violation of his rights under article 19, paragraph 2, of the Covenant. It further notes the State party's contention that the author was administratively sanctioned in accordance with the requirements of national legislation for having breached the procedure for organizing and holding a mass event. In the present case, the Committee has to consider whether the restrictions imposed on the author's right to freedom of expression are justified under any of the criteria set out in article 19, paragraph 3.

9.3 The Committee observes that article 19, paragraph 3, of the Covenant provides for certain restrictions only as provided by law and necessary: (a) for respect of the rights or reputations of others; and (b) for the protection of national security or of public order (ordre public), or of public health or morals. It recalls that freedom of opinion and freedom of expression are indispensable conditions for the full development of the person, and that such freedoms are essential for any society and constitute the foundation stone for every free and democratic society.[3] Any restrictions on the exercise of such freedoms must conform to strict tests of necessity and proportionality and "must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated."[4]

9.4 The Committee notes that the author took part in a small gathering in front of a monument. The author was arrested in this context. He was found guilty of organizing an unauthorized mass event and was sentenced to seven days of administrative arrest. In this connection, the Committee notes the State party's explanation that the Law on Mass Events is aimed at creating conditions for the realization of citizens' constitutional rights and freedoms and for the protection of public safety and public order during the holding of public events on streets and squares and in other public locations, and that the author was administratively sanctioned for having breached the procedure provided for in the above-mentioned law. The Committee notes, however, that the State party does not argue, and nothing in the case file suggests, that the event that took place on 23 March 2008 was in conflict with the twenty-fifth republic-wide marathon. In this regard, it notes that the State party has not sufficiently demonstrated in what way it was necessary to detain and punish the author, in light of his concrete acts on 23 March 2008,[5] under article 19, paragraph 3, of the Covenant, and how it was justified to impose on him a seven-day administrative arrest. In this context, the Committee recalls that it is up to the State party to show that the

[3] See the Committee's general comment No. 34 (2011) on freedoms of opinion and expression, para. 2, *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 40*, vol. I (A/66/40 (Vol. I)), annex V.

[4] Ibid., para. 22.

[5] See paragraphs 2.1, 2.5 and 2.6 above.

restrictions on the author's right under article 19 are necessary, and that, even if a State party introduces a system aimed at striking a balance between an individual's freedom to impart information and the general interest in maintaining public order in a certain area, such a system must not operate in a way that is incompatible with article 19 of the Covenant. It therefore concludes that in the circumstances of the present case, the author's rights under article 19, paragraph 2, of the Covenant, have been violated.

9.5 In view of this conclusion, the Committee decides not to examine separately the author's claim under article 21 of the Covenant.[6]

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the State party has violated the author's rights under article 19, paragraph 2, of the International Covenant on Civil and Political Rights.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including reimbursement of any legal costs incurred by the author, together with adequate compensation. The State party is also under an obligation to take steps to prevent similar violations in the future.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views, and to have them widely disseminated in Belarusian and Russian in the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

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[6] See, for example, communication No. 1830/2008, *Pivonas* v. *Belarus*, Views adopted on 29 October 2012, para 9.4.